QUESTION PRESENTED FOR REVIEW

Is an order of a United States District Court denying enforcement of a foreign forum selection clause appealable as a collateral final order?

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* The caption of the case in this Court contains the names of all parties. Respondent Chandris Inc., sued herein as "Chandris Cruise Line" and "Chandris (Italy) Inc.", does not have any corporate parent, subsidiary or affiliate.

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TABLE OF AUTHORITIES

No. 88-23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LAURO LINES s.r.l.,

Petitioner,

—v.—

SOPHIE CHASSER, ANNA SCHNEIDER, ILSA KLINGHOFFER and LISA KLINGHOFFER, as Co-Executrixes of the Estate of LEON and MARILYN KLINGHOFFER, VIOLA MESKIN, SEYMOUR MESKIN, SYLVIA SHERMAN, PAUL WELTMAN, EVELYN WELTMAN, DONALD E. SAIRE and ANNA G. SAIRE, CHANDRIS CRUISE LINES, ABC TOURS TRAVEL CLUB, CHANDRIS (ITALY) INC., PORT OF GENOA, ITALY, CLUB ABC TOURS, INC., and CROWN TRAVEL SERVICE, INC., d/b/a RONA TRAVEL and/or CLUB ABC TOURS, and CLUB ABC TOURS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN SUPPORT OF PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, officially reported at 844 F.2d 50 (2d Cir. 1988), is printed in the Petition for Cert. at 1a-14a. The decision

of the United States District Court for the Southern District of New York, dictated in open court on October 21, 1987, not officially reported, is printed in the Petition for Cert. at 15a-18a.

JURISDICTIONAL STATEMENT

The order below sought to be reviewed is dated April 7, 1988. It was entered on April 7, 1988.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

Certiorari was granted on October 11, 1988.

STATEMENT

Respondent Chandris Inc., sued herein as "Chandris Cruise Line" and "Chandris (Italy) Inc." joins petitioner Lauro Lines s.r.l. in urging that the order of the district court denying enforcement of the passage ticket's forum selection clause is immediately appealable under the *Cohen* collateral order doctrine, *Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541 (1949).

Chandris, Inc. hereby adopts the brief of the petitioner Lauro Lines s.r.l. and the factual statement contained therein.

SUMMARY OF ARGUMENT

An order denying enforcement of a passage ticket's forum selection clause satisfies the third prong of the *Cohen* "collateral order" test, because it is "effectively unreviewable at the conclusion of the litigation." The forum selection clause is not merely a "defense to liability," but is instead the anticipation that the parties will litigate their disputes in a particular, exclusive forum. By requiring a full adjudication on the merits of the unrelated tort claim, before an appeal on the enforceability of

the contract's forum selection, the Second Circuit has denied the parties an important contractual right.

Point 1

The District Court's Order is a Collateral Final Order Within the *Cohen* Doctrine and is Immediately Appealable.

The terms of a contractual forum selection clause are violated the moment a party brings an action in a forum other than that agreed upon. If that improper forum issues an order denying enforcement of the forum selection clause, an important contract right is lost. Absent immediate appeal, such an order is "effectively unreviewable at the conclusion of the litigation."

The quoted language is the third-prong of the *Cohen* Doctrine[1] as refined by this Court in *Coopers & Lybrand v. Livesay* 437 U.S. 463, 468 (1978).

Conceding a split among the circuits on this issue[2], the Second Circuit chose to follow the Seventh Circuit in holding that such an order fails to satisfy the third prong of this test.

Although citing the Eighth Circuit's decision in *Farmland Industries*, (supra. at note 2), the Second Circuit otherwise ignores it.

Farmland Industries contains the most concise and convincing reasoning why orders denying enforcement of forum selection clauses satisfy the third prong of the *Cohen/Cooper* Test:

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1 *Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541 (1949).

2 The Second Circuit cited: *Farmland Industries v. Frazier-Parrott Commodities* 806 F.2d 848, 850-51 (8th Cir. 1986) and *Coastal Steel Corp v. Tilghman Wheelabrator, Ltd.* 709 F.2d 190, 193-197 (3rd Cir. 1983), cert. denied 464 U.S. 938 (1983) as examples of decisions concluding that orders denying forum selection enforcement are immediately appealable; and *Louisiana Ice Cream Distributors v. Carvel Corp.* 821 F.2d 1031, 1032-34 (5th Cir. 1987) and *Rohrer, Hibler & Replogle Inc. v. Perkins* 728 F.2d 860, 862 (7th Cir. 1984) cert denied 469 U.S. 890 (1984) as examples of decisions denying immediate appellate review.

> After a final determination is made on the merits it will be too late effectively to review the present order because the contractual right to trial in Illinois will have been lost. Granted, defendants could raise this issue after a final determination on the merits and possibly gain a new trial in Illinois. However, a Missouri trial and appeal is not what was contemplated by the parties when they signed the contract; what was contemplated is single trial resolution of disputes in Illinois. Denying defendants immediate appeal of this issue will effectively deprive them of a contractual right. 806 F.2d at 851.

Having contracted for a cruise which would begin and end in Italy, the parties also contracted that any lawsuits between them would likewise "begin and end" in Italy. The expectation, under the contract, was not only to create a venue in Italy but to create an *exclusive venue* there.

The Achille Lauro's Mediterranean cruises were marketed in over 15 countries on four continents. Of the 728 passengers aboard the vessel during the voyage in question, only 72 were Americans.

The selection of a forum by contract is an important contractual right which has been upheld by this Court. *Bremen v. Zapata Off-Shore Co.* 407 U.S. 1, 10 (1972). Its function within the maritime industry is to protect an international shipping concern from having to engage in litigation in multiple, distant jurisdictions.

As recognized by Justice Kennedy in his concurrence in *Stewart Organization, Inc. v. Ricoh Corporation* ____ U.S. ____ (1988) 56 U.S.L.W. 4659, forum selection clauses are important contractual rights which should, except in the most exceptional cases, be given controlling weight:

> "The federal judicial system has a strong interest in the correct resolution of these questions, not only to spare litigants unnecessary costs but also to relieve courts of time consuming pre trial motions. Courts should announce and encourage rules that support private parties who negotiate such clauses". id. at 4662

The Second Circuit, in opining that "the right to secure adjudication in a particular forum is not lost simply because enforcement is postponed," ignores the simple and compelling logic contained in *Farmland* and *Stewart*, supra.

The fundamental purpose of a forum selection clause is completely frustrated by a scheme that would require full adjudication on the merits before allowing an appeal of a decision denying enforcement of the clause. While the Second Circuit is technically correct when it contrasts forum selection clauses with constitutionally created rights, (Petition for Cert. at 12a), the purpose of the clause is similar to the purpose of qualified governmental immunity discussed in *Mitchell v. Forsyth* 472 U.S. 511 (1985).

In *Mitchell*, the Court held that a district court's denial of qualified governmental immunity is an order which can be immediately appealed under the *Cohen* Doctrine. Such an order would not be effectively reviewable after a trial on the merits because, held the Court, such immunity is intended to be an "immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." id. at 526.

A forum selection clause is similarly not merely a "defense to liability," but instead a contractual agreement that the parties will litigate any disputes within a particular forum. By selecting a particular forum, the parties renounce their rights to litigate in any other forum.

Hence, although not emanating from any statute or the common law, the right created by the contracting parties anticipates that they will both be immune from suit in a forum other than the one selected by them. It is not only that they will not be cast in damages in an inappropriate forum, but that they will not be called upon to litigate in such a forum.

Under *Cohen*, the concept of Section 1291 finality is to be given a "practical rather than a technical construction" 337 U.S. at 546. By disallowing an immediate appeal of the district court's order denying enforcement of the forum selection clause, the Second Circuit abandons this pragmatic approach.

In *Gillespie v. United States Steel Corp.* 379 U.S. 148, 152 (1964), this Court highlighted the practical nature of this inquiry, noting that "in deciding the question of finality the most important competing considerations are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other" (quoting *Dickinson v. Petroleum Conversion Corp.* 338 U.S. 507, 511 (1950)).

Although *Gillespie's* application should be limited to appeals of national significance, lest Section 1291 "be stripped of all significance", (*Coopers & Lybrand v. Livesay* supra., 437 U.S. at 477, note 30), we respectfully submit that there is national significance in having the United States courts avoid the burden of providing a forum to litigants who have agreed to air their disputes elsewhere. To require a full adjudication on the unrelated merits of a tort claim, before an appeal is allowed on the enforceability of a contractual forum selection clause, wastes precious judicial and legal resources and fails to provide a "practical construction" to the concept of Section 1291 finality.

CONCLUSION

The order of the District Court denying enforcement of the passage contract's foreign forum selection clause is immediately appealable as a collateral final order.

Respectfully submitted,

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